

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

FILED

2000 OCT -7 AM 9:34

STATE OF TENNESSEE, ex rel.
ROBERT E. COOPER, JR., ATTORNEY
GENERAL and REPORTER,

Petitioner,

v.

HCI Direct, Inc., a Delaware corporation,
doing business as Silkies,

Respondent.

RICHARD R. HOOKER, CLERK

RL

D.C.

No. _____

ASSURANCE OF VOLUNTARY COMPLIANCE

This Assurance of Voluntary Compliance or Discontinuance ("Assurance") is entered into by and between the Attorneys General of the States of Alaska, Delaware, Hawaii¹, Michigan, Montana, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington and Wyoming (the "States", "Participating States" or "Attorneys General") and HCI Direct, Inc. ("Respondent"). This Assurance resolves the Attorneys General investigation regarding this matter pursuant to their respective consumer protection statutes ("Consumer Statutes")².

¹ With regard to Hawaii, Hawaii is represented by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For simplicity purposes, the entire group will be referred to as the "Attorneys General," and such designation, as it pertains to Hawaii, refers to the Executive Director of the State of Hawaii's Office of Consumer Protection.

² Alaska Unfair Trade Practices and Consumer Protection Act, AS 45.50.471 *et seq.*; Delaware Consumer Fraud Act, Title 6 Chapter 25 at 6 Del. C § 2513 *et seq.*; Hawaii Consumer Protection Act, Haw. Rev. Stat. §487-1 *et seq.* and Haw. Rev. Stat. §480-2; Michigan Consumer Protection Act, MCL 445.901 *et seq.*; Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. § 30-14-103 *et seq.*; N.C.G.S. § 75-1.1; Consumer

I. BACKGROUND

1.1 Respondent directly markets women's hosiery and other merchandise to consumers nationally and within each of the States through, among other things, direct mail solicitation pieces that offer a free sample pair of the merchandise, such as hosiery.

1.2 After consumers respond to this solicitation, consumers become enrolled in a continuity sales plan by which consumers are shipped additional merchandise for their purchase, absent cancellation by the consumer. Specifically, without notice of cancellation, payment by the consumer for a shipment of merchandise automatically triggers another shipment from the Respondent.

1.3 The Attorneys General have investigated Respondent's marketing practices and allege that their conduct in conducting this continuity sales plan violates their respective consumer statutes including the States' contention that Respondent's solicitation and subsequent materials fail to clearly and conspicuously disclose all material terms and conditions of the Respondent's continuity sales plan.

1.4 Respondent denies the allegations of the Attorneys General. Respondent believes that its solicitations are in full compliance with all state and federal laws, and clearly and conspicuously discloses all material terms and conditions of the Respondent's continuity sales plan.

II. DEFINITIONS

As used in this Assurance, the following words or terms shall have the following

Fraud and Unlawful Credit Practices, N.D. Cent. Code § 51-15-01 *et seq.*; Ohio Consumer Sales Practices Act, R.C. §1345.01 *et seq.*; Oregon Unlawful Trade Practices Act, ORS 646.605 to 646.656; Pennsylvania Consumer Protection Law, 73 P.S. 201-1 *et seq.*; SDCL Ch. 37-24; Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*; Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Comm. Code Ann. §17.41 *et seq.*; Washington Statutes, Chapter 19.86 and 19.56 R.C.W.; Wyoming Consumer Protection Act, Wyo. Stat. § 40-12-101, *et seq.*

meanings:

- 2.1 "Advertise," "Advertisement," or "Advertising," shall mean any written, graphic or electronic statement, illustration or depiction sent via direct mail or contained on any website operated by Respondent that is designated to promote the sale of Respondent's goods or services.
- 2.2 "Affirmative Response" shall mean an affirmative act on the part of a consumer which indicates that he or she agrees to be enrolled in a Continuity Sales Plan and accepts the terms and conditions of an offer of merchandise by Respondent.
- 2.3 "Attorney General" shall mean the Attorney General of the State of and/or the Office of the Attorney General of the State of one of the Participating States.
- 2.4 "Clear and Conspicuous" or "Clearly and Conspicuously," shall mean a statement that, regardless of the medium in which it is made, is readily understandable and presented in such size, color, contrast, duration, location, and audibility, compared to the other information with which it is presented, that it is readily apparent to the person to whom it is disclosed. A Clear and Conspicuous statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner that is readily apparent and understandable.
- 2.5 "Consumer" shall mean any person, a natural person, individual, governmental agency or entity, partnership, corporation, company, limited liability company or corporation, trust, estate, incorporated or unincorporated association, or any other legal or commercial entity, however organized residing in the State.

- 2.6 "Initial Solicitation" shall mean a solicitation by Respondent to examine, purchase or use merchandise, goods or services mailed to Consumers who are not current customers of the Respondent.
- 2.7 "Continuity Sales Plan" shall mean a method of selling or distributing merchandise in which payment for one shipment of merchandise by the Consumer is deemed a re-order for another shipment by the seller unless the Consumer indicates that a change or cancellation is desired.
- 2.8 "Respondent" shall mean HCI Direct, Inc. t/a Silkies its successors and assigns and its wholly-owned subsidiaries.
- 2.9 "Represent" means to state or imply, directly or indirectly, through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages, or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word "Represent," including without limitation "Representation," "Misrepresent," and "Misrepresentation."
- 2.10 "Response Vehicle" shall mean that portion of the solicitation which Consumers must complete or act upon to indicate acceptance of Respondent's offer.
- 2.11 "Referral Plan" shall mean a program in which Respondent solicits current customers to refer new customers by providing to current customers Initial Solicitation materials to be distributed to and completed by the customers being referred.
- 2.12 "Effective Date" shall mean the date by which Respondent shall be in compliance with the terms of the Assurance, which shall be January 1,

2008, provided, however, that with respect to Paragraph 3.2, the Effective Date shall be April 1, 2008.

III. ASSURANCES

Pursuant to Tenn. Code . Ann. Section 47-18-107, it is hereby AGREED by the Attorneys General and Respondent, acting directly or through any corporation, subsidiary, or any other device that:

3.1 Respondent shall include in the Initial Solicitation and in all mailings accompanying the shipment of merchandise, including a free sample, and on each invoice and on each written communication seeking payment of an account, a clear and conspicuous disclosure of all material terms, conditions and obligations of Respondent's offer.

3.2 Respondent shall obtain an Affirmative Response from Consumers before enrolling them in any Continuity Sales Plan and prior to providing any merchandise, including a free sample of merchandise, pursuant to such Continuity Sales Plan. In the event that the Affirmative Response is obtained on an Initial Solicitation pursuant to Respondent's Referral Plan, the Affirmative Response must contain the Consumer's signature and date. On all Affirmative Responses for Respondent's Continuity Sales Plan, including without limitation, those obtained on referrals or otherwise, the Respondent shall clearly and conspicuously display in the immediate vicinity of the Response Vehicle where the Consumer is indicating consent, a clear and conspicuous disclosure that the Respondent's offer is subject to the terms and conditions of the Respondent's Continuity Sales Plan. For purposes of this Assurance, such clear and conspicuous disclosure shall include the fact, if true, that by accepting a free sample, the Consumer will receive additional shipments unless the Consumer cancels.

3.3 Respondent shall provide the following information ["Offer Terms"] in a clear and conspicuous manner prior to obtaining an Affirmative Response from a Consumer to be enrolled in any Continuity Sales Plan and prior to providing any merchandise pursuant to such Continuity Sales Plan, including a free sample of merchandise:

- A. Description of all material terms and conditions of the Continuity Sales Plan.
- B. A description of the merchandise that will be offered.
- C. A statement of the costs of the merchandise and any other costs or costs to the Consumer of participating in the Continuity Sales Plan. For purposes of this provision, if the Consumer must pay any postage, shipping or handling expenses in order to receive or return any merchandise, the nature of the expense shall be disclosed, in lieu of the actual cost of such expense.
- D. A statement of the Consumer's right to cancel enrollment in the Continuity Sales Program, including the method by which the Consumer can cancel and any time period by which Consumers must exercise their right to cancel.
- E. The duration of time over which merchandise will be provided, if there is a set time period.
- F. Disclosure of the fact, if such is the case, that the Consumer will continue to receive additional shipments of merchandise, following receipt of the free sample, and the Consumer will be billed for the merchandise unless the Consumer cancels.

3.4 If Respondent operates a Continuity Sales Plan, Respondent shall include in all mailings accompanying a shipment of merchandise, including a free sample, on each invoice and

on each written communication seeking payment of an account, a clear and conspicuous statement of the following:

A. A toll free number which Consumers may call during normal business hours to cancel, a mailing address to which Consumers may write in order to cancel, and a website to which Consumers may e-mail an order to cancel; and

B. If Respondent has represented that Consumers may receive reimbursement for postage, shipping and handling expenses incurred in returning goods, information regarding the steps Consumers must take to receive such reimbursement.

3.5 Respondent shall, as soon as possible, but not later than seven (7) business days after receipt of notice of cancellation, from a Consumer, refrain from sending any further shipments of merchandise to such Consumer. In those cases where such additional shipments are sent, Respondent shall promptly send written notice advising the Consumer that no further collection attempts will be made and no negative credit information will be maintained by Respondent or transmitted to a third party.

3.6 Respondent shall provide confirmation to Consumers who cancel by way of e-mail.

3.7 Respondent shall not use or refer to fictitious personal testimonials in its Initial Solicitations, Advertisements, or in other representations to Consumers.

3.8 Respondent shall not use any Advertisements nor make oral representations that directly or indirectly contradict terms or language contained in Respondent's written contracts or communications with Consumers.

3.9 Respondent shall not misrepresent in Advertisements, the Initial Solicitation or other communications (oral or written) to Consumers, directly or indirectly, any aspect of its Continuity Sales Plan.

3.10 Respondent shall not represent, directly or indirectly, that a Consumer has been "chosen," or "selected," (or words of similar import), when in truth and in fact, the Respondent has made no such special selection or choice and simply mailed solicitations to Consumers as a matter of its business course. No such language may be used unless all of the following conditions are met:

(A) The selection process is designed to reach a particular type or particular types of person;

(B) The selection process uses a source other than telephone directories, city directories, tax listings, voter registration records, purchased mailing lists, or similar common sources of names;

(C) No more than ten percent (10%) of the names considered are selected.

3.11 The Respondent agrees to fully comply with the FTC Mail Order Rule at 16 C.F.R. § 435.1 *et seq.*

IV. RESTITUTION AND RECORD KEEPING

Pursuant to Tenn. Code Ann. Section 47-18-107(b):

4.1 Respondent agrees to provide full and complete restitution, including without limitation, shipping and handling costs, to any Consumer who files a complaint in the future with Respondent, the Attorney General, the States, the Federal Trade Commission or Better Business Bureau and whose complaint is received by Respondent claiming that they did not order merchandise or goods shipped by Respondent. There is no time limit on this restitution program.

4.2 Respondent shall for a period of one (1) year following the Effective Date of this Assurance provide a full refund to any Consumer who has contacted Respondent, the Attorneys General, the States, the Federal Trade Commission or Better Business Bureau to request a refund for any reason whatsoever and whose request is received by Respondent.

4.3 Thirty (30) days after the close of this one (1) year period, the Respondent shall file with the Attorney General a written report in electronic format. This report shall be broken down by State and in alphabetical order by Consumer last name and shall include the following information:

- A. The name and address of each Consumer who requested a refund;
- B. The amount of refund.

4.4 Thirty (30) days after the close of this one (1) year period the Respondent shall also file another written report in electronic format. This report shall be broken down by State and in alphabetical order by Consumer last name and shall include the records required pursuant to paragraph 4.8, that includes the information concerning complaints from consumers who either received or were billed for a product they did not order for the preceding year.

4.5 Respondent shall provide a copy of this Assurance to all current and future principals, officers and directors, and to all current and future managers, agents, representatives and employees of Respondent having supervisory responsibilities with respect to the subject matter of the Assurance.

4.6 For a period of three (3) years after the Effective Date of this Assurance, Respondent shall respond and upon request make available copies of records that demonstrate compliance with the requirements of this Assurance.

4.7 Respondent shall for a period of three (3) years after the Effective Date of this Assurance, provide to any Attorney General copies of current materials being used in connection with solicitation of Consumers in that state within ten (10) business days following such request.

4.8 For a period of five (5) years after the Effective Date of this Assurance, Respondent shall create and retain (for a period of three (3) years following the date of such creation) the following records, in electronic format broken down by State, that reflect or relate to any and all contact, by way of telephone, e-mail, or in writing or otherwise, from Consumers claiming they received merchandise or were being billed for merchandise that they did not order (hereinafter referred to as "DNO" information). Defendant shall track DNO information on a regular basis and supply this information to the States within twenty (20) days of receipt of a written request. This information must contain, at a minimum:

- A. The name and address of the Consumer making the contact;
- B. The date and substance of the contact;
- C. Respondent's handling and disposition of this contact;
- D. Any written response to the consumer; and
- E. A true and correct copy of the Consumer's Response Vehicle.

V. PAYMENT TO THE STATES

5.1 Respondent shall pay the sum of four hundred and fifty-five thousand dollars (\$455,000.00) to the States, as follows: Payments to the States shall be used as determined by the Attorneys General who are parties to this Assurance for attorneys fees and investigative costs, Consumer education, litigation, public protection or education or local Consumer aid

funds, at the discretion of each State as allowed by each State's law. The distribution of Tennessee's share of these monies is described in the Agreed Final Order.

VI. DEFAULT

6.1 Upon making each of the payments specified in Section V herein, Respondent shall be fully divested of any interest in, or ownership of, any monies paid and any interest in the monies, and the monies and any subsequent interest or income derived there from shall inure entirely to the benefit of the States pursuant to the terms of this Assurance.

6.2 In the event any Attorney General believes that Respondent has committed a violation of this Assurance and intends to file a motion or other pleading seeking contempt of court or other sanctions for violation of this Assurance, then the Attorney General shall first give Respondent fourteen (14) business days notice before such motion or pleading. The giving of such notice shall not prevent the Attorney General from beginning any action after the expiration of the fourteen business day period. Prior to the expiration of such fourteen day business period, Respondent may respond to the Attorney General with any information it wishes to provide regarding the alleged violation of the Assurance. Irrespective of the remedy or relief elected or pursued by the State, nothing herein shall be deemed to waive, diminish or otherwise avoid Respondent's monetary obligations set forth in Section V.

VII. REPRESENTATIONS AND WARRANTIES

7.1 Respondent represents that the signatory to this Assurance has authority to act on behalf of and bind the Respondent.

VIII. UNDERTAKINGS AND ACKNOWLEDGMENTS

8.1 The Parties acknowledge that it is their intention that this Assurance may only be enforced by the Parties hereto, and by any court of competent jurisdiction.

8.2 Respondent shall undertake to respond to all Consumer complaints in good faith and in a reasonable, timely manner.

8.3 The signatory Attorneys General shall not institute any further civil proceedings nor take any further civil action against the Respondent under the States' above referenced Consumer Statutes with respect to the subject matter of this Assurance as described in Section III up to and including the Effective Date of this Assurance. Nothing herein shall waive the States' rights to enforce this Assurance.

8.4 The Court shall maintain jurisdiction over the subject matter of this Assurance of Voluntary Compliance and over Respondent for the purpose of enforcement of this Assurance of Voluntary Compliance, provided, however, that nothing contained herein shall be construed to waive or limit an individual right of action of any Consumer or any other local, state, federal or governmental agency.

IX. GENERAL PROVISIONS

9.1 Respondent is entering into this Assurance for settlement purposes only and nothing in this Assurance shall be construed as an admission of a violation of law for any purpose all of which Respondent expressly denies; and neither Respondent nor the Attorneys General shall make any representations to the contrary. No part of this Assurance constitutes or shall be deemed to constitute an admission by Respondent that it has ever engaged in any conduct proscribed by this Assurance.

9.2 Respondent is represented by legal counsel and has been advised by its legal counsel of the meaning and effect of this Assurance.

9.3 This Assurance does not constitute an approval by the Attorneys General of any of Respondent's past or future advertising, marketing, or other business practices and Respondent shall not make any representation to the contrary.

9.4 Nothing in this Assurance shall be construed as relieving Respondent of its obligations to comply with all state and federal laws, regulations, and rules, or as granting permission to engage in any acts or practices prohibited by such law, regulation, or rule.

9.5 Any notices required to be sent to the State or to the Respondent by this Assurance shall be sent by United States mail or certified mail return receipt requested. The documents shall be sent to the following addresses:

FOR THE STATE OF TENNESSEE, ATTORNEY GENERAL:

Deputy Attorney General
Consumer Advocate & Protection Division
Tennessee Attorney General's Office
Post Office Box 20207
Nashville, TN 37202-0207
Fax: 615-532-2910
Phone: 615-741-1671

FOR THE RESPONDENT:

HCI Direct, Inc.
3050 Tillman Drive, Suite 101
Bensalem, Pennsylvania 19020

9.6 Titles or captions in this Assurance are inserted as a matter of convenience and for reference only and in no way define, limit, extend, or describe the scope of this Assurance or any provision thereof.

9.7 If any portion of this Assurance is held invalid by operation of law, the remaining terms of this Assurance shall not be affected and shall remain in full force and effect.

9.8 Any signature required to affect any part of this Assurance, may be executed by the Parties in counterparts, each of which signatures shall be deemed an original, and any such document executed in counterparts shall have the same effect and authority.

9.9 This Assurance shall be binding on Respondent and its future purchasers, merged parties, inheritors, or other successors in interest, and Respondents shall take no direct or indirect action to circumvent the terms of this Assurance. In no event shall assignment of any right, power, or authority under this Assurance avoid Respondent's compliance with the terms of this Assurance.

9.10 This Assurance sets forth the entire agreement between the Parties, and there are no representations, arrangements, or understandings, oral or written between the Parties relating to the subject matter of this Assurance that are not fully expressed herein or attached hereto.

9.11 Nothing in this Assurance shall be construed as a waiver, creation or enlargement of any private rights of Consumers.

9.12 Any failure by the State to insist upon the strict performance by the Respondent of any of the provisions of this Assurance of Voluntary Compliance shall not be deemed a waiver of any of the provisions of this Assurance of Voluntary Compliance, and the State, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Assurance of Voluntary Compliance and the imposition of any penalties provided for by the laws of the State.

9.13 The Respondent shall not state or imply or cause to be stated or implied that the State, nor any governmental entity thereof, has approved, sanctioned, or authorized any practice, act, Advertisement or conduct of the Respondent.

9.14 To the extent that the provisions of this Assurance conflict with the Assurance of Voluntary Compliance or Discontinuance previously entered into by a Participating State with Hosiery Corporation of America, (the "Prior Assurance") then this Assurance shall apply but

only to the extent of the conflict and only as to such Participating State. Notwithstanding the foregoing, the disclosure required to be made on all Affirmative Responses pursuant to Paragraph 3.2 shall be deemed to satisfy the disclosure required to be made pursuant to Paragraph V.3(a)(v) of the Prior Assurance for States that have entered into both this Assurance and the Prior Assurance.

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ASSURANCE OF VOLUNTARY COMPLIANCE

HCI Direct, Inc., a Delaware corporation, doing business as Silkies



ROBERT E. COOPER, JR.

Attorney General & Reporter



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At the Request of:



MARY CLEMENT

Director

Division of Consumer Affairs

Department of Commerce and Insurance

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5th Floor, Davy Crockett Tower

Nashville, TN 37243-0600

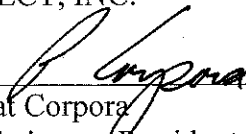
(615) 741-4737

105875


Date:

FOR RESPONDENT:
HCI DIRECT, INC.


BY:


Pat Corpora
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